

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In re)
)
Amendment of Section 73.622(b),)
Table of Allotments,)
Digital Television Broadcast Stations)
(Hagerstown and Silver Spring, Maryland))

MEMORANDUM OPINION AND ORDER

Adopted: February 24, 2004

Released: February 25, 2004

By the Chief, Media Bureau:

1. The Commission, by the Chief, Media Bureau, herein considers a petition for reconsideration filed on August 25, 2003, by Entravision Holdings, LLC (“Entravision”), licensee of NTSC station WJAL(TV), channel 68, Hagerstown, Maryland. Entravision seeks reconsideration of the July 25, 2003, staff letter denying its request, to change the community of license for the station’s paired DTV channel 16 allotment, WJAL-DT, from Hagerstown to Silver Spring, Maryland.¹

2. **Background.** In its petition for rulemaking, Entravision argued that the reallocation of DTV channel 16 to Silver Spring, and the relocation of its transmitter from Hagerstown to a site within the Washington, D.C. metropolitan area, would result in a preferential arrangement of allotments, consistent with the analog television allotment priorities and the Commission’s rules regarding modification of television authorizations to specify a new community of license.² Entravision acknowledged, however, that its

¹ See Letter to Entravision Holdings, LLC from Barbara A. Kreisman, Chief, Video Division.

² *Amendment of the Commission’s Rules Regarding Modification of FM and TV Authorizations to Specify a New Community of License*, 4 FCC Rcd 4870 (1989), *clarified*, 5 FCC Rcd 7094 (1990)(*Community Modifications*). See also, *Sixth Report and Order on Television Allocations*, 41 FCC 148, 167 (1952). Specifically, Entravision argued that, all other relevant factors being equal, its proposal would result in the first digital television broadcast station licensed to Silver Spring; would result in a net population gain of 4,264,749 persons in the Washington, D.C. metropolitan area for WJAL-DT; and, because Hagerstown currently has licensed to it two NTSC stations, not leave that community unserved or underserved.

proposed transmitter relocation and initiation of service in Silver Spring raised interference issues with respect to land mobile operations in the Washington, D.C. area. According to the staff's independent engineering analysis, Entravision's proposed WJAL-DT would be located only 7.9 km from the community reference point for adjacent land mobile operations on channel 17. The Commission's rules require that digital television stations be located a minimum of 250 kilometers (155 miles) from the geographic center of a co-channel land mobile allocation, and a minimum of 176 kilometers (110 miles) from the geographic center of an adjacent land mobile allocation.³ Operating as proposed, WJAL-DT would be 168.1 km (more than 96 percent) short spaced to land mobile operations on channel 17 in the Washington area.

3. Nevertheless, Entravision requested a waiver of the spacing rules to implement its proposed operation, based, in large measure, on its pledge to eliminate any resulting interference to land mobile operations on channel 17.⁴ It specifically sought waiver of Section 73.623(e) of the Commission's Rules, insofar as it requires that "all affected land mobile licensees consent to the requested action."⁵ In support, Entravision argued that when the Commission made the existing WJAL-DT channel allotment, it did so knowing that it violated spacing requirements without any requirement that land mobile users' consent be obtained. Entravision claimed that by that action, the Commission acknowledged the difficulty of complying with these requirements and the absence of the need to secure the prior consent of existing land mobile users. It also asserted that the Commission implicitly recognized that the consent requirement is "onerous" and "virtually impossible" to satisfy due to the large number of land mobile users in the Washington area. Entravision further maintained that the Commission expressed "its continued willingness to waive land mobile spacing requirements in order to accommodate the transition to digital broadcasting," citing various instances where the Commission either encouraged or granted DTV proposals that could be constructed and operated in harmony with adjacent land mobile facilities despite noncompliance with distance separations.⁶ Finally, Entravision stated that grant of its proposal would have the added benefit of eliminating interference that would be caused to WJAL-DT from station WFDC-DT, operating on adjacent channel 15 at Arlington, Virginia.

³ See 47 C.F.R. § 73.623(e).

⁴ Entravision proposed to use interference mitigation technology that it argues has recently been deployed successfully and "in harmony" with adjacent land mobile facilities. It stated that it had no basis to conclude that such technology would not be successful if used in this case.

⁵ *Accord, Advanced Television Systems and Their Impact Upon the Existing Television Broadcast Service*, MM Docket No. 87-268, *Sixth Report and Order*, 12 FCC Rcd 14588, 14664 (1997) ("[I]f . . . problems occur, it will be the initial responsibility of the DTV licensee to protect against or eliminate harmful interference to land mobile services that have commenced operations and that are operating in accordance with our rules at the time the DTV licensee goes on the air.").

⁶ In that regard, Entravision relied primarily on the recent waiver of applicable land mobile distance separation criteria in *Amendment of Section 73.606(b), Table of Allotments, Television Broadcast Stations (Blanco, Texas)*, 17 FCC Rcd 17166 (2002) ("*Blanco*"), where the Commission directed the Media Bureau to consider such waivers, as appropriate, to implement the provision of service on that channel.

4. Entravision's request for waiver of the spacing rules was denied and its rulemaking proposal was dismissed on July 25, 2003. The staff explained that the television table of allotments is based on a system of minimum station separations which, along with maximum allowable powers and antenna heights, establish the degree of protection from interference afforded to spectrum users. Because those rules presumptively serve the public interest, applicants seeking waivers to operate from short-spaced sites are required to demonstrate that the public interest will be better served by a waiver of, rather than by complying with, those rules under the specific circumstances presented. In the case of WJAL-DT, the staff found that the public interest would not be served by waiving the minimum distance spacing rule. Specifically, it concluded that a grant of Entravision's proposal to change its community of license would, under these circumstances, likely cause significant disruption to existing public safety and emergency operations in the Washington, D.C. metropolitan area. The staff found that the continued operation of an accurate and reliable public safety communications system in the region serves the public interest, especially in light of the tragic events of September 11, 2001. Moreover, it stated that a waiver of our rule here to allow WJAL-DT to be nearly 100 percent short spaced to public safety operations on channel 17 without first obtaining the consent of affected licensees would essentially render that rule ineffective.

5. The staff also rejected Entravision's conclusion that our recent action in *Blanco* compelled the grant of its waiver request with respect to land mobile operations in the Washington, D.C. area. It explained that the *Blanco* decision was based solely on the special circumstances presented in that case, which were distinguishable from Entravision's proposal. It was noted that the applicant in *Blanco* was the winning bidder for a channel that was subsequently eliminated when the Commission adopted a new reallocation plan.⁷ In so doing, the Commission specifically noted the result of its action on the Blanco allocation was to effectively foreclose that service. It directed the staff to expedite the substitution of channel 17 to Blanco and consider waiver of applicable land mobile distance in order to effectuate that proposal. The Commission also required that if such a waiver were granted, it would be conditioned upon the applicant agreeing to various technical restrictions on its operation, including limiting its signal that would impact land mobile operators in the more highly populated area (in that case, Houston). The staff noted that Entravision made no such commitments here, and it concluded that given the almost complete short spacing, it could not practically provide such protection to land mobile users. In that regard, it was observed that the short spacing involved in *Blanco* (11 percent) was far less egregious than that presented here (more than 96 percent), and that channel 17 at Blanco was located outside the area in which the land mobile users there operated, whereas Entravision's proposed operation is located directly in the area the Washington, D.C. land mobile users operate.

6. Finally, the staff noted that the present allotments for WJAL-DT and WFDC-DT, Arlington, do not interfere, but that the licensees of those two stations have agreed to propose facilities that conflict with one another and accept the interference that results to

⁷ See, *Reallocation and Service Rules for the 698-746 MHz Spectrum Band (Television Channels 52-59)*, 17 FCC 11613 (2002).

each DTV station. Thus, it found that Entravision's proposed move would alleviate self-created interference problems, and that was not a persuasive basis for creating significant disruption to land mobile operations.

7. **Petition For Reconsideration.** Entravision now asserts that the staff's conclusion that its proposed change of its community of license is likely to cause disruption to land mobile users operating on channel 17, and that it could not effectively protect them from interference, is contrary to both law and fact. It restates that its current allotment violates spacing requirements with respect to land mobile operations, and that that was done without land mobile users' consent; that by doing so, the Commission implicitly recognized that short-spaced allotments do not conform to the "real world" coexistence of DTV operations; that in order to for both services to co-exist, land mobile separation rules may be waived; and the consent requirement is impossible to satisfy given the large number of land mobile users in the Washington, D.C. area.

8. Entravision further reasons that, because land mobile distance separation and consent requirements cannot be realistically satisfied, its proposal addresses the underlying concern of those rules – the interference to be caused by its proposed construction and operation. In that regard, it again argues that the Commission has recognized that such interference could occur and licensees would be obligated to protect or eliminate such interference with respect to land mobile users that had commenced operating. It claims that the staff misapplied *Blanco* in that it made a "false distinction" based on the degree of short spacing rather than as a precedent for waiving spacing requirements when interference can be effectively contained.

9. In this regard, Entravision states that *Blanco* involved a co-channel relationship rather than, as is proposed here, an adjacent-channel situation where interference prevention methodologies can be applied. Entravision argues that, in denying its waiver request, the staff failed to substantiate that such interference techniques would not be successful in this case. Moreover, inasmuch as it is willing to have its authority to operate conditioned upon the prevention of interference to land mobile operators on channel 17, Entravision states that the staff inaccurately concluded that, unlike the *Blanco*, it did not agree to accept interference from current and future land mobile facilities. Moreover, Entravision argues that so long as it is prepared to prevent interference from its operation to existing and future land mobile users and there is no reason why it should not succeed in doing so, the failure to grant its requested waiver was erroneous.⁸

⁸ Entravision also argues that the staff incorrectly concluded that WJAL-DT and WFDC-DT, channel 15, Arlington, Virginia, as currently allotted, do not interfere with one another as a basis to find that the alleviation of the self-created interference by the stations' DTV proposals was not a persuasive reason to waive our spacing rules. It believes that the Bureau suggests that interference between adjacent channels does not occur, whereas it states that "non-interference" is only achieved when adjacent channels are either virtually co-located or are sufficiently far apart that the required desired-to-undesired signal interference ratio is achieved throughout the service areas. It maintains that the current allotments for the WJAL-DT and WFDC-DT facilities results in unmasked adjacent-channel interference affecting over 3,100 people. Entravision reiterates that the proposed co-location of its transmitter with that of WFDC-DT would enable

10. **Discussion.** Section 1.106 of the Commission's Rules requires, among other things, that a request for reconsideration reference new facts or changed circumstances not previously present or findings of fact and/or conclusions of law which the petitioner believes to be erroneous. *See* 47 C.F.R. §1.106(c)&(d). Entravision's petition essentially raises matters advanced and addressed earlier in this proceeding with respect to its request for a waiver of the Commission's spacing rules, and sets forth its disagreements with the findings and conclusions of the staff to deny that waiver, which it now terms "contrary to law and fact." For the reasons that follow, the Bureau concludes that Entravision fails to establish a basis to reverse the denial of its request to waive Section 73.623(e) of the Commission's rules to permit its proposed change of community of license from Hagerstown to Silver Spring, Maryland.

11. As explained in the earlier ruling, the Commission will generally not grant a waiver of minimum station separation rules for allotment purposes absent the demonstration of a compelling need to depart from those well-established separation standards.⁹ In similar cases, we have repeatedly observed that strict adherence to the spacing requirements upon which the Table of Allotments is based "is necessary . . . in order to provide a consistent, reliable and efficient" scheme of allotments.¹⁰ In those rare cases that the Commission has granted short-spaced allotments, it has done so based on highly unusual circumstances and when there was a substantial public benefit to be gained at a minimal cost.¹¹ As explained in the July 25th letter, Entravision did not make the compelling showing to support its waiver request for a short-spaced allotment. In this regard, Entravision's showing is like similar cases where petitioners seek short-spaced allotments to improve their geographic coverage area, but the public interest benefits advanced simply do not outweigh the harms to be caused to the integrity of the Table of Allotments, and the Commission's minimum spacing rules and its spectrum management policies.

12. We reject the underlying premise of Entravision's argument on reconsideration -- that it was entitled to the grant of its requested waiver of Section 73.623(e) of the Commission's Rules because that rule has been waived in the past or was "violated" when its digital channel was initially allotted. It is axiomatic that even if the Commission has waived this or any of its rules in the past, it is not compelled to do so

it to overcome that interference from that station and "to provide optimal service to the public without the encumbrance of agreed-to interference in excess of that otherwise permitted."

⁹ *See, e.g., Amendment of Section 73.606(b), Television Table of Allotments (Pueblo, Colorado)*, 10 FCC Rcd 7662, 7667 (MMB 1995), *app. for rev. denied*, 11 FCC Rcd 19649 (1996), *aff'd on remand*, FCC 99-162 (released July 7, 1999).

¹⁰ *Amendment of Section 73.606(b), Television Table of Allotments (Millington, Maryland)*, 45 RR 2d 1689, 1690-91 (1979). *See also, Amendment of Section 73.606(b), Television Table of Allotments (Pueblo, Colorado)*, 10 FCC Rcd 7662 (1995), *review denied*, 11 FCC Rcd 19649 (1996),

¹¹ *See, e.g., Notice of Proposed Rulemaking to Amend Television Table of Assignments to Add New VHF Stations in the Top 100 Markets*, 63 FCC 2d 840, 855 (1977), *Report and Order*, 81 FCC 2d 233, 261-67 (1980), *recon. denied*, 90 FCC 2d 160 (1982).

in every case or under any circumstances. We are also not persuaded that the comparatively minor short spacing to land mobile facilities attendant to the initial allotment of Entravision's present paired DTV channel supports further and significantly increased deviation from the spacing rules absent other compelling public interest factors.¹² The larger public interest considerations underlying the establishment of the initial DTV Table of Allotments substantially outweigh the limited public benefits alleged in this case, and the current short spacing to land mobile operations does not justify exacerbation of that spacing to the degree proposed here.¹³

13. We continue to remain unconvinced that Entravision's limited reading of *Blanco* compels the waiver of the spacing rules in order to accommodate the grant of its application. In *Blanco*, a short-spaced allotment was made to implement the Commission's allocation of a channel to that community that was subsequently eliminated in a new reallocation plan. In that case, the Commission's reallocation plan foreclosed the provision of service to a community designated to receive its first service. In making the short-spaced allotment necessary to implement that service, we placed a restriction limiting any operation on that channel to effectively limit its signal to avoid interference to land mobile operations in a more highly populated area. In this case, by contrast, Entravision has an allotted DTV channel to implement digital service to Hagerstown, and there is no suggestion that its ability to provide that service is foreclosed or at risk, as was clearly the case in *Blanco*. Entravision's DTV channel will continue to be available to it for the provision of WJAL-DT's digital service. Thus, we do not find that waiver of the minimum spacing rules is necessary to accommodate the transition to digital broadcasting in this case.

14. Entravision's focus in its reconsideration pleading on its pledge to eliminate resulting interference is misplaced. In *Blanco*, the Commission was able to assure adequate protection of potentially affected land mobile operators impacted by the comparatively minor 11 percent short spacing involved there by restricting the operating parameters of any operation on that channel. Given the nearly 100 percent short spacing

¹² When this channel was allotted, it was part of an extraordinary complex undertaking of identifying a channel arrangement to fully accommodate approximately 1,700 existing television stations so that each was assigned a paired DTV channel. Although every effort was made to minimize the number and extent of such short spacings, some were nevertheless created and incorporated into the initial DTV Table of Allotments. *Sixth Report and Order* in MM Docket No. 87-268, 12 FCC Rcd 14588, 14629 (1997). Moreover, when a licensee, operating from an authorized site seeks authority to move to one that is short spaced (or, as is the case with WJAL-DT, proposes to increase its existing short spacing), it faces a higher burden, and we will consider other factors, such as the unavailability of a fully-spaced site, the magnitude of the short spacing, the nature and extent of any predicted loss of service, the concerns of the affected licensees, and whether the licensee had knowledge of existing spacing constraints when it obtained its authorization. See, e.g., *Townsend Broadcasting Corp.*, 62 FCC 2d 511 (1976). Other than Entravision's contention that it will serve more people, there is nothing presented to indicate that its present allotment or facilities is unsatisfactory or unavailable.

¹³ Similarly, the alleviation of the claimed unmasked interference from WFDC-DT, Arlington, Virginia, attendant to the creation of the initial DTV Table of Allotments is not a public interest factor of such weight as to overcome the other service concerns raised by this proposal.

involved in this case, we are unable to effectively restrict the operating parameters of any implementing construction permit to limit predicted interference to land mobile operations in the highly populated Washington, D.C. area.

15. The potential harm to the public, before any resulting interference to land mobile operators and the provision of public safety services can be cured, is substantial. As proposed by Entravision, before that interference can be overcome, it will first have to be identified and studied in conjunction with individual land mobile operators, customized equipment and filtering may have to be manufactured, installed, and tested, appropriate governmental approvals may be necessary to obtain, and all of these efforts must be coordinated with all affected spectrum users without disruption of the public services provided by existing land mobile operations. Given its admitted inability to identify in advance the large number of land mobile operators that could be impacted, Entravision has not demonstrated how service disruptions of that potential magnitude and complexity can be quickly, effectively and reliably avoided. Moreover, simply suggesting that methodologies exist that should permit Entravision to address the interference to be created here does not adequately demonstrate that it can and will alleviate that interference expeditiously and without substantial disruption to existing services. We do not agree that it is up to the staff, as Entravision claims, to demonstrate that those general methodologies will *not* work. Perhaps most importantly, the grant of the requested waiver under these circumstances would effectively eliminate the consent requirement and permit the grant of virtually any short-spaced proposal application based merely on an applicant's pledge to eliminate the resulting interference those rules are intended to avoid after it occurs. Such action would create a precedent for similar proposals that would essentially eviscerate the spacing rules, and will result in a significant disruption of important land mobile services to the public and undermine the Commission's spectrum management planning and policies.¹⁴

16. Furthermore, because of the location of this channel in the National Capital area, the requested waiver poses an additional significant and substantial threat to public safety if such service disruptions to land mobile operations were to occur during an emergency situation. The terrorist acts of September 11, 2001, and the ongoing terrorist threats to national security have made clear the need of public safety spectrum users to have the most reliable access possible to sufficient telecommunications capacity during

¹⁴ To the extent that Entravision pledges to protect only existing land mobile operations, there is an additional and significant public cost without countervailing benefits in that the grant of this proposal will effectively restrict the continued development and expansion of that spectrum as intended by the Commission by foreclosing any future land mobile proposals that would be unable to effectively protect WJAL-DT's proposed operation. To the extent that Entravision pledges to accept interference from future land mobile operators, such interference could essentially eviscerate the service it intends to provide, further undermining the allotment rules and policies. In addition, the presence of Entravision's proposed DTV station could constrain the service of future land mobile operations in a manner that cannot be characterized or remedied as interference *per se*. For example, because a DTV signal resembles electrical noise, a higher noise level often means that the desired signal level must also be higher to provide acceptable service. In a land mobile system, this could result in a mobile station being unable to operate at as great a distance from a base station as it could before the noise level increased.

an emergency. A reliable telecommunications system that will not be overwhelmed in a crisis is fundamental to the ability of first responders, medical personnel and others to do their jobs in an emergency. In such a situation, ongoing licensee experimentation to relieve interference to public safety spectrum users cannot be considered as ensuring vital communications resources and, as such, does not serve the public's interest.

17. Entravision's contention that a preferred arrangement of television allotments will result from the grant of its requested waiver is also unavailing. As presently allotted, WJAL-DT cannot reach the Washington market in compliance with our rules. Reallotment of its channel as a first service to a community adjacent to Washington, D.C., as proposed, then allows it to relocate there and therefore substantially increase the population served by the station. While the proposed allotment of a DTV channel to Silver Spring may ostensibly represent that community's first local service, in reality it would be merely an additional local service in the substantially larger and better served Washington, D.C. television market. In *Community Modifications*, the Commission observed that there might be some instances where licensees moving to more populated areas to increase their service area, even at the expense of service to more rural communities, would be consistent with our allotment priorities. The Commission, however, stated that it would rely on the application of the allotment priorities "in conjunction with the Commission's minimum distance separation requirements and the present intensive use of spectrum in urban areas, [to] act as a barrier to the clustering of stations in major metropolitan areas [and to] address the issue as necessary."¹⁵

18. If Entravision's community of license change proposal was permissible under our rules without the need for a waiver of the spacing rules, our analysis of the public interest implications might well be limited.¹⁶ As another factor in the public interest balance, however, we must consider that relocation of WJAL-DT's service area would be achieved at a high cost – the loss of existing service to Hagerstown. The curtailment of existing service is not in the public interest generally, and the weight accorded the public's expectation that existing service will continue is substantial and is sufficient to counterbalance a preferred arrangement of allotments.¹⁷ Based on the totality of circumstances and public interest considerations present in this case, we cannot agree that

¹⁵ *Community Modifications*, 4 FCC Rcd at 4873.

¹⁶ In this regard, Entravision's assertion that a preferred allotment arrangement would result if its proposal was granted is not dispositive of the issue of whether our technical rules should be waived to permit the reallotment of its channel. In that regard, although there is a presumed public interest basis for a preferential arrangement of analog television channels in community of license change proceedings, that fact doesn't necessarily supercede the public interest considerations inherent in using the required station separation rules to protect the integrity of the DTV Table of Allotments and the land mobile spectrum.

¹⁷ See, e.g., *Amendment of Section 73.606(b), Television Table of Allotments (Eatonton and Sandy Springs, Georgia, and Anniston and Lineville, Alabama)*, 6 FCC Rcd 6580, 6586-87(1991). See also *Hall v. FCC*, 237 F. 2d 567 (1956). When WJAL-TV ceases operating on its current analog channel, Hagerstown will be deprived of this existing service, and, because Entravision's proposal would actually remove a DTV channel allotted to that community, it will not even be offered the "poor substitute" of a vacant allotment that could be used to reestablish service to Hagerstown at some future date.

the limited public interest benefits attendant to the proposed reallocation of DTV channel 16 from Hagerstown to Silver Spring outweigh the myriad and substantial harms that will result from a waiver of the station separation requirements. As such, Entravision's proposal is inconsistent with the Commission's allotment priorities insofar as it fails to propose a short-spaced allotment with significant public benefit that can be achieved at minimal cost and disruption. Moreover, it would substantially undermine the Commission's use of the minimum spacing rules to ensure that community of license change procedures not be misused to cluster stations in major metropolitan areas at the expense of service to more rural communities.

19. Based on the above, we are not persuaded that the staff acted erroneously by denying Entravision's requested waiver. The proposed reallocation of channels here would result in a significant curtailment of existing television service, would pose an unacceptable threat to the public by causing disruptive and substantial interference to land mobile operations, would foreclose the development and expansion of land mobile operations, and effectively eviscerate the Commission's current spacing rules, community of license change policies and spectrum management goals with little, if any, offsetting benefits to the public. Accordingly, the Petition for Reconsideration in this matter filed by Entravision Holdings, LLC IS DENIED.

FEDERAL COMMUNICATIONS COMMISSION

W. Kenneth Ferree
Chief, Media Bureau